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IN THE SUPREME COURT OF THE STATE OF UTAH

B. J. ANDERSON,
Plaintiff and Appellant,

vs.

EUNICE SHUMWAY,
Defendant and Respondent

Case No. 10,794

RESPONDENT'S BRIEF

Appeal from Judgment of the
Fourth District Court
Utah County, State of Utah
The Honorable Allen B. Sorensen, Judge

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CASES CITED

IN THE SUPREME COURT OF THE STATE OF UTAH

B. J. ANDERSON,
Plaintiff and Appellant,

vs.

EUNICE SHUMWAY,
Defendant and Respondent

Case No. 10,794

RESPONDENT'S BRIEF

STATEMENT OF THE KIND OF CASE

This is a personal injury action arising out of an automobile accident.

DISPOSITION IN LOWER COURT

The case was submitted to the jury and the jury found the issues in favor of the defendant, no cause of action.

Plaintiff's Motion For New Trial was denied by the lower court.

RELIEF SOUGHT ON APPEAL

Appellant asks that the verdict of the jury and

the denial of his Motion For New Trial be reversed and that the case be remanded for a new trial.

STATEMENT OF FACTS

The Statement Of Facts contained in the Brief of Appellant does not state all of the facts and gives only his version as to how this accident happened. He was the loser below. These facts should be stated, "not merely as the appellant contends them to be, but view, as they must on appeal, favorable to the verdict of the jury." Thus a further Statement Of Facts is in order.

The automobile accident that gave rise to this action occurred at about 4:30 o'clock p.m. on November 12, 1964. It had rained during the day and at this time the rain had changed to sleet or snow. The roadway where the accident happened was wet. The place where the accident happened is east of Orem, Utah, in Utah County. Fourth South Street in Orem, Utah, goes directly east from Highway 91 to top of a bluff some distance from Orem and then makes a sharp right turn downhill on an access road to the roads below which are in the Provo River area. The accident between the vehicles of plaintiff and defendant occurred on this curve. The scene of the accident can best be understood by reference to the two photographs reproduced below which were "Exhibits 4 and 6". "Exhibit 4" shows the direction of defendant's vehicle and "Exhibit 6" shows the direction of plaintiff's vehicle. There is no center line marked on the roadway.

Exhibit 4

Exhibit 6

It should be noted at this point that this curve is a blind curve and visibility of approaching traffic is essentially blocked out until a vehicle is into the curve. The improved portion of the roadway is approximately 21 feet in width and there is a gravel shoulder on each side of the road (Ex. P-1).

We turn now to the testimony of the two parties involved in this accident (there were no eye witnesses other than the two drivers).

Plaintiff — Plaintiff testified that he had gotten off work about 4:00 o'clock p.m. and had driven from the Geneva Steel Works to Orem and then from U.S. 91 in Orem east on Fourth South to the place where this accident happened. He was alone in his white 1959 Oldsmobile automobile (Tr. 65). He testified that the weather was raining, turning to sleet or snow, and that his windshield was clear and he could see. He was approaching the intersection at approximately 20 miles per hour and slowed down as he entered the right hand turn to the south (Tr. 66). At that time he testified that he first saw the approaching car of defendant some 200 feet away, traveling in the center of the road and coming directly toward him. He stated that he was almost stopped when the impact occurred and that the impact was a head-on glancing type collision. The front end of defendant's car struck the front end of his car. (Tr. 88). The defendant's car continued

around the curve and was stopped facing west on Fourth South Street.

Defendant — Mrs. Eunice Shumway, the defendant, was employed on this day doing day work for a Mrs. Harvey King at his residence at Elm Circle in Provo, Utah (Tr. 200). She owned a 1954 Mercury two door autmobile, which was the vehicle involved in this accident. She resided at Lindon, Utah (Tr. 200). Mrs. Shumway was on her way home from work at the time this accident happened.

She testified that it was raining hard and that it was difficult to see. The lights on her Mercury were on at the time of the accident (Tr. 201-202). Mrs. Shumway testified that as she proceeded upgrade toward this curve the right wheels of her car were on the gravel and at the time of the collision her car was entirely on the right side of the center line. Her testimony in this regard is as follows:

"Q. As you approached this intersection just tell us in your own words what happened?

A. Well, it was raining real hard. I was driving quite slow. It was hard for me to see, and as I got up there I just started to making the turn as this car hit, and I stopped.

Q. Did you see the car of Mr. Anderson before the impact?

A. No, sir, I did not.

Q. Where was your vehicle in relation to this intersection when the accident happened?

A. It was on the side of the road. As I went up the road I kept my one wheel off on the gravel.

Q. Let me ask you this question: Where was your car at the time of this accident in relationship to what we might call the center line of the roadway?

A. It was on the side of the road.

Q. Which side?

A. On the right side."

(Tr. 202-203)

It is evident from the testimony of the two parties involved that they view the happening of this accident in complete opposition. The plaintiff claims that the defendant struck him head-on at a time when his vehicle was partially off the road on his side of the road. The defendant on the other hand states that her vehicle was entirely on her side of the road when the accident happened. Under the point of argument in this case it will be shown conclusively that the plaintiff's version of how the accident happened is inherently improbable.

The only other person who has any knowledge of this accident was the investigating officer, Sgt. J. Reed Burgener, of the Orem City Police. He arrived at the scene of the accident and observed the two vehicles, and found that the plaintiff's vehicle had made a right turn and was facing south and that the defendants vehicle had made the turn and was then facing west on the 4th south street.

He first inquired as to whether either of the drivers had been injured. He had some conversation with both drivers but was vague as to what they told him concerning the accident. (Tr. 53) He then had the plaintiff, Mr. Anderson, assist him in an investigation of the roadway. It was raining and visibility was poor. (Tr. 53). Mr. Anderson held the tape at the edge of the blacktop on the access road and the officer measured a paved roadway of 21 feet (Tr. 54). He testified that he found some mud on the roadway in the vicinity of the vehicle of the plaintiff, and testified that it was more than 13 feet from the east side of the blacktop which would put it in the lane of travel of the plaintiff. (Tr. 31). The officer could not determine the probable point of impact between the two vehicles. There were no skid marks from either vehicle. (Tr. 29). All he found was some mud and dirt on the roadway in the vicinity of the vehicle of plaintiff and in his opinion it came from the vehicles involved in the accident. (Tr. 30). He very candidly admitted also that he could have made a determination from both vehicles to find where the dirt and mud had come from, if in fact it had dropped from under one of the vehicles, but he did not do this. (Tr. 45) He also testified that he did not know from which vehicle the mud had come and admitted that it could have come from any point underneath either car. His testimony was of little assistance to the jury in enabling it to

determine which of these vehicles had encroached on the lane of travel of the other.

The case was then submitted to the jury on proper instructions of negligence and contributory negligence and the jury returned a verdict in favor of the defendant.

ARGUMENT

POINT I.

THE TRIAL COURT DID NOT ERR IN SUBMITTING THE ISSUE OF LIABILITY TO THE JURY.

The plaintiff-appellant lists three points of argument namely, that the Court erred in failing to direct a verdict on the issue of liability and in submitting the issues of plaintiffs contributory negligence and defendant's negligence to the jury. Reduced to their essence the argument of plaintiff is that the Court erred in submitting the issue of liability to the jury. The facts of this case viewed within the framework of legal principles repeatedly announced by this Court will show that the argument of plaintiff must fail. He caused the accident. The jury so found.

In the case of *Weenig Bros. vs. Manning*, 1 Utah 2d 101, 262 Pacific 2d 491, this Court stated:

> "In order to upset the judgment and command one in its favor, the first obstacle plaintiff must overcome is to demonstrate that the evidence shows with such certainty that reasonable minds could not differ thereon that the defendant was guilty of negli-

gence which proximately caused the collision. In the absence of such degree of proof we could not direct that such finding be made and reverse the decision of the lower court. The defendant having prevailed, on conflicting matters the evidence is viewed in the light most favorable to him."

An in the case of *Larson vs. Evans*, 12 Utah 2d, 245, 364 Pacific 2d 1088, our Court said:

> "The major issue thus presented is: Was the evidence so compelling against a finding of contributory negligence on the part of Jon Larson as to require a finding on the question in his favor as a matter of law? In order to upset the verdict and command one in the plaintiffs' favor the evidence must show with such certainty that reasonable minds could not differ thereon that the plaintiff, Jon Larson, merely did what a prudent person would have done under the circumstances. The defendant having prevailed below, the evidence on conflicting matters must be view in the light most favorable to him."

Applicable also is the statement of this Court in the case of *Ewan vs. Butters*, 16 Utah 2d 272, 399 Pacific 2d 210:

> "In order to justify the trial court's dismissal, the evidence must show with sufficient certainty that reasonable minds would not differ thereon that plaintiff was negligent and that her negligence was a proximate cause of her injury. It should be borne in mind that the defendant has the burden of proving both of those issues by a preponderance of the evidence. Consequently, if there is any

> reasonable basis in the evidence, or from lack of evidence, upon which fairminded jurors could reasonably remain unconvinced on either or both of those issues, then the trial court was not justified in ruling against her as a matter of law."

Appropriate also is the statement of Justice Henriod in his concurring opinion in the case of *Badger v. Clayson,* ..... Utah 2d ....., 422 Pacific 2d 665:

> "The crux of this case revolves around one instruction given by the court supplemented by interrogatories presented to the jury. The jury decided six to two in favor of Clayson. Had this writer been on the jury, he is inclined to the conclusion reached by the two dissenting jurors. But that cannot substitute for our jury system."

With the above principles in mind our next inquiry must be into the facts, viewed as they must be, favorable to the defendant, and then determine if there was sufficient evidence before the lower court to justify submission of the issue of liability of the jury on conflicting facts and inferences.

The accident happened November 12, 1964 at approximately 4:30 p.m. It had rained during the day and at this hour in the vicinity of this accident the rain was turning to sleet and snow. It was overcast and misty and visibility was poor according to the investigating officer. The plaintiff was driving a 1959 Oldsmobile automobile, white in color. He

did not have his headlights on. (Tr. 88). The defendant on the other hand did have her headlights on, (Tr. 202), and she had dimmed her lights on her way from where she worked to where this accident happened (Tr. 202). We may reasonably infer from this testimony that headlights on this day and at that time were necessary. We may also infer that the plaintiff's white automobile without headlights presented a difficult object for an approaching motorist to see.

The roadway on which the plaintiff was traveling before the accident goes straight east from U.S. 91 in Orem, Utah, to the top of the bench and then turns sharply to the right and downhill to the river bottom. The so called "access road" from this is only 21 feet in width and would be classified as a narrow road. The area of the accident is difficult to describe in words and can best be seen pictorially from the photographs that have been reproduced in this brief. These views show this particular corner from the direction each driver was traveling and give a fair representation of the visibility that each driver had. The curve is essentially blind — approaching drivers have no opportunity to see one another until the turn is completed.

The plaintiff's theory of the case supported by his testimony only, is that he approached the curve traveling approximately 20 miles per hour and slowed down somewhat as he entered the turn. At that

moment he observed the approaching vehicle of the defendant, some 200 feet away and noted that she was encroaching on his half of the roadway. He was traveling approximately 15 miles an hour when he was struck headon. (Tr. 88-90).

Contrasted to the testimony of the plaintiff is that of the defendant concerning her position on the roadway when this accident occurred. Her testimony was clear and explicit — that as she proceeded northbound up this access roadway she was entirely on her side of the road, and, in fact, because of its narrowness her practice was to have her right wheels off the paved portion onto the shoulder. She had just reached the top of the hill and had started to turn when her vehicle was struck by the plaintiff. She testified that at all times while proceeding up this access road her car was on her side of the road and was on her side of the road at the time she was struck by the plaintiff.

There were no skid marks leading up to a probable point of impact and the only other evidence is that of the investigating officer who found some mud on the road but made no attempt to find out which part of which car the mud came from, and indeed, it could have come from under either car and from any point under either car.

The testimony of the defendant is entirely consistent with the exercise of due care. She was traveling at a reasonable rate of speed (25 miles per hour)

and she was traveling on her side of the road. Admittedly, she did not see the plaintiff's vehicle until impact but this is explained due to the fact that this was a blind curve; that plaintiff was driving a white vehicle with its lights off against a background of sleet and snow. These facts are not sufficient for a jury to find negligence on the part of the defendant.

We turn now to the negligence of the plaintiff. These facts are established: Plaintiff was driving a white Oldsmobile against a background of snow and sleet. He did not have his lights on and it is apparent from the testimony of the defendant that lights were necessary on account of the weather. He had reduced his speed from approximately 20 miles an hour as he proceeded east to 15 miles an hour as he rounded the turn and started downhill. He testified that the collision was a head-on glancing collision. Under these circumstances we would expect to find front end damage to both vehicles. The front end of his car was damaged. This is shown by the repair bill introduced in evidence (Exhibit 10) which shows that the left front headlight of his car was replaced. However, when we view the two photographs of the defendant's vehicle which have been reproduced herein, we see immediately that the damage to the defendant's vehicle was not on the left front but rather on the left fender behind the headlight. The

Exhibit 7

Exhibit 8

attitude of the two vehicles on impact is apparent from the damage that was done. The vehicle of defendant was traveling straight and the vehicle of plaintiff was angled in such a way that the left front corner of plaintiff's vehicle struck the left fender of defendant's vehicle. This is exactly what would be expected of a vehicle that was making a sharp turn to the right as was plaintiff and had encroached over the center line. These physical facts are entirely consistent with the testimony of the defendant. On the other hand, however, they show that the accident could not have occurred as plaintiff suggests. He testified that his vehicle was partially off the road and against the bank when he was struck a glancing, head-on blow by the defendant. Were this the case we would have found damage on the front end of the defendant's car. There was none.

He testified further that he had an opportunity to observe the defendant's car for some 200 feet and that it came straight toward him. The only possible way that the accident could have produced the damage it did was for the vehicle of the defendant to have been entirely in his lane of travel and suddenly have made a sharp turn to the right just before the two cars impacted. This is the only way that defendant could have avoided front end damage. There is no testimony that this is the way the collision occurred and the only conclusion that can be drawn is that the accident did not happen in the way that plaintiff testified.

There was ample evidence before the jury that the defendant was not negligent as alleged by plaintiff and ample evidence before the jury that the plaintiff was negligent in the manner that he operated his vehicle. At most, the evidence was conflicting and reasonable men could reach different conclusions. Such being the case a clear jury question was presented and the jury resolved these issues against the plaintiff.

A Utah case very similar to the case at bar is *Moser vs.* Z.C.M.I., 114 Utah 58, 197 Pac. 2d 136: The accident in this case happened approximately 1½ miles south of Logan, Utah, on the highway between Logan and Ogden. It happened about 7:30 p.m. October 10, 1945. It had rained during the day and the road was wet. It was dark and both vehicles had their headlights on. The roadway at the point of collision was approximately 22 feet in width. The collision between the two vehicles occurred just south of a highway bridge. The plaintiff testified that as the defendant's south-bound truck crossed the bridge it jerked slightly, then came into the plaintiff's lane of travel and turned to the right just before impact and that plaintiff struck the left rear of defendant's truck. The defendant's driver testified that as the north-bound vehicle of plaintiff approached him that it gradually encroached in his lane of travel and that he moved as far to the right as he could and actually scraped the bridge abutment and after he left the bridge he turned his ve-

hicle further to the right at which time he was struck by the plaintiff. The investigating officer testified that there were tire tracks on the right shoulder of the road which lead from the bridge to the barrow-pit where the defendant's vehicle was overturned. This, of course, would indicate that defendant's vehicle was on its right side of the road when the accident happened. However, the officer also testified that there was nothing on the highway that would indicate a point of collision. There was no evidence that either driver made any application of brakes. There were no skid marks found at the scene of the accident.

The evidence of the parties in this lawsuit was conflicting. Both claimed that the other had encroached on the wrong side of the highway. Our Court announced the following principle:

> "The ultimate question of fact in this case, is of course, which of the two drivers failed to keep his vehicle upon his proper side of the road. It is clear that at least one of them crossed the center line. The determination of this ultimate fact was for the jury. And the jury having determined this question in plaintiff's favor, and the trial Court having denied defendant's motion for new trial, this Court cannot say that the trial court abused its discretion unless there was no substantial evidence to support the verdict, or in other words, that all reasonable minds must agree that it was plaintiff, and not defendant, Rogers, who transgressed the center line of the highway."

The Court then commented on the respective theories and evidence of the parties and concluded that there was sufficient evidence to support the verdict in favor of plaintiff. The verdict and judgment of the lower court was affirmed.

An earlier Utah case to the same effect is *Cheney vs. Buck*, 56 Utah 29, 189 Pacific 81. This was an automobile—bicycle accident that occurred in Layton, Utah. Each of the parties contended that the other had failed to yield half the traveled portion of the highway. In this regard the Court held:

> "It is undisputed that the respondent was not going over four miles per hour on his bicycle. That he was on the right side of the traveled road seems well established, but whether he was not was for the jury to say, not for the Court."

These Utah cases establish the proposition that where there is evidence from which a jury could find that one or the other, or both, of two vehicles involved in a collision, had encroached over the center line, then the question of liability is one for the jury.

The trial judge correctly applied these principles to this case. He committed no error in submitting the issue of liability to the jury.

Cases from other jurisdictions support the legal conclusion set forth above. For analogous cases see *Poston vs. Clinton*, 406 Pac. 2d 623 (Wash.). This accident involved two vehicles that collided head-on

on a paved highway divided by a white center strip. Each driver claimed that the other had encroached on his side of the highway and each claimed that the negligence of the other had caused the accident. In regard to the issue of liability the Court stated:

> "On the first point, we think the trial court properly refused to grant a directed verdict in favor of the appellants. The evidence with reference to the point of impact consisted of circumstantial evidence (such as the debris on the highway, a long gouge in the pavement evidently made by the Clinton automobile, the position of the cars after the accident), the testimony of eyewitnesses and expert witnesses as to the point of impact. There was sufficient evidence from which the jury, as trier of the fact, could find that the point of impact was in either the northerly or southerly traffic lane or the jury could have believed that there was no preponderance of evidence in favor of either side."

The jury verdict in favor of defendant was reversed on other grounds.

In *Roth vs. Spelts*, 326 Pac. 2d 80 (Colo.) the two approaching vehicles collided on a curve. A verdict for plaintiffs was affirmed on appeal, the Court noting:

> "The facts and circumstances relating to the conduct of the parties at the time and immediately preceding the impact, and questions concerning the credibility of the several witnesses, presented questions which could only be resolved by the jury. To justify the with-

drawal of a case from the jury, not only should the facts be undisputed, but the conclusions to be drawn from those facts should be indisputable.

The jury determined that the accident was the proximate result of the negligence of defendants and resolved the issue of contributory negligence against them, all of this under instructions which are not challenged."

(It should be noted that the appellant in the case at bar does not challenege the Court's instructions.)

For numerous other cases supporting the proposition set forth above see Digest Key No. 245 (13). (Automobiles).

CONCLUSION

The accident in this case occurred about 4:30 p.m. on November 12, 1964. Visibility was poor; it had been raining and the rain was turning to sleet and snow at the time the accident happened. The accident happened on a curve on a roadway that proceeds east from Orem to the top of the bluff and then makes a sharp right turn downhill to the river bottom roads below. The curve is a blind curve. Approaching drivers do not have visibility, one of the other, until the turn is almost completed. The roadway is also quite narrow being only approximately 21 feet in width. There are no center lines marking the road. The plaintiff was driving a white Oldsmobile without his lights on, although the evidence

would support the conclusion that lights were necessary at that time.

The defendant testified that as she went uphill from the river bottom road her car was entirely on her side of the road and it stayed on her side of the road up to the impact. Plaintiff on the other hand testified that he observed the approaching car of defendant and that she had crossed the center line some distance before the accident and that he had pulled to the right and was struck essentially head-on. This presents a clear conflict of fact to be resolved by the jury. The ultimate question was which of these drivers had transgressed the center line and this question, as in the Moser case, (Supra) was for the jury.

We also point out that when the physical evidence of damage on the two vehicles is considered the theory of plaintiff as to how the accident happened is not supported. The damage on his car was on the left front corner. The damage on the vehicle of defendant was behind the left headlight on the left fender. There was no damage on the front end and this is clearly seen by the Exhibits reproduced in this brief. Had this collision been a head-on collision as suggested by plaintiff then surely one would expect to find damage on the front end of both cars. The most reasonable explanation for the accident is that the plaintiff encroached over the center line as he was making a right turn and the left front of his car struck the left fender of the de-

fendant's car at an angle. This physical evidence of damage is consistent with the testimony of defendant but not consistent with the testimony of plaintiff. The jury verdict in favor of the defendant is amply supported by this evidence and the trial court was entirely justified in submitting the issue of negligence and contributory negligence to the jury.

The verdict and judgment of the lower court must be sustained.

Respectfully submitted,

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